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No. 89-2025

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

FIREMAN'S INSURANCE COMPANY AND
D. H. BLATTNER & SONS, INC. ..... *Petitioners,*

vs.

ARKANSAS STATE CLAIMS COMMISSION AND
ARKANSAS STATE HIGHWAY AND
TRANSPORTATION DEPARTMENT. ..... *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

RESPONDENT'S BRIEF IN OPPOSITION

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EDITOR'S NOTE:

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QUESTIONS PRESENTED

I.

THE ARKANSAS STATE CLAIMS COMMISSION SYSTEM DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT SINCE IT PROVIDES CLAIMANTS WITH AN ADEQUATE POST-DEPRIVATION REMEDY.

II.

THE ARKANSAS STATE CLAIMS COMMISSION SYSTEM PROVIDES CLAIMANTS WITH AN OPPORTUNITY TO BE HEARD IN A MEANINGFUL MANNER IN ACCORDANCE WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

LIST OF PARTIES

Petitioners are foreign corporations authorized to do business in the State of Arkansas, namely, Fireman's Insurance Company, a New Jersey corporation and surety on Arkansas State Highway and Transportation Department projects that are the subject of this litigation, and D. H. Blattner & Sons, Inc., which is a Minnesota corporation, and is the completing contractor for the surety.

Respondents are the Arkansas State Claims Commission, an arm of the Arkansas Legislature authorized to determine claims against the State of Arkansas, and the Arkansas State Highway and Transportation Department, an agency of the State of Arkansas and obligee on the subject bond contracts which named Fireman's Insurance Company as the surety.

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OPINIONS BELOW

The pertinent opinions below are included in the Petitioners' Appendix. The opinion of the Arkansas Supreme Court, affirming the Pulaski County Circuit Court, is also included in the Petitioners' Appendix, Pages 1-16.

The judgment of the Arkansas Supreme Court was entered on February 26, 1990. A Petition for Rehearing was denied on March 26, 1990.

JURISDICTION

The respondent, Arkansas State Highway and Transportation Department, asserts that the petitioners have failed to allege a constitutional violation invoking the jurisdiction of this Court since the Arkansas State Claims Commission system provides the petitioners with an adequate post-deprivation remedy.

STATEMENT OF THE CASE

This action commenced as a claim filed by the petitioners in the Arkansas State Claims Commission with jurisdiction based on Article 16, §2 of the Constitution of Arkansas and Ark. Code Ann. §19-10-204(a) which provides that the Arkansas State Claims Commission shall have exclusive jurisdiction over all claims against the State of Arkansas. (Appendix A-1)

Petitioner, Fireman's Insurance Company, provided performance bonds on two highway construction projects naming the petitioner as surety and the respondent, Arkansas State Highway Commission as obligee. The original contractors on the highway projects defaulted and Fireman's Insurance Company retained petitioner, D. H. Blattner & Sons, as the completion contractor. During the completion of the contracts many disputes arose between the petitioners and respondent, Arkansas State Highway Commission, which culminated in a claim in the Arkansas State Claims Commission by petitioners based upon breach of contract, misrepresentation, negligence and contract interference.

Pursuant to the rules and regulations of the Arkansas State Claims Commission, the respondents were afforded a hearing wherein they presented sworn testimony and other evidence in support of their claim, and were allowed to cross-examine witnesses produced by the respondent. A complete transcript of this hearing was made and preserved. The respondent, Arkansas State Claims Commission, issued a written order finding that the petitioners failed to prove any improper action on the part of the respondent, Arkansas State Highway and Transportation Department, and, therefore, unanimously denied and dismissed petitioners' claim.

Although the rules and regulations provide that an appeal to the Arkansas General Assembly may be taken from a decision of the Arkansas State Claims Commission, the petitioners chose to file for review to the Circuit Court of Pulaski County under the Administrative Procedure Act and subsequently sought an additional remedy by filing a petition for a Writ of Certiorari in Pulaski Circuit Court. The respondents moved to dismiss the petition and appeal based upon the defenses of lack of subject matter jurisdiction, exclusiveness of the remedy provided by the Arkansas State Claims Commission, doctrine of sovereign immunity, and that the procedure of the Arkansas State Claims Commission satisfied the Fourteenth Amendment of the United States Constitution. After a hearing, the Circuit Court granted the respondents' motion to dismiss and denied the petition for writ of certiorari.

From this order, the petitioners appealed to the Arkansas Supreme Court, which affirmed the Circuit Court's order. The Arkansas Supreme Court specifically found that the sovereign immunity granted by Article 5 §20 of the Constitution of the State of Arkansas barred an action against the respondents; that the procedure for hearing claims in the Arkansas State Claims Commission satisfied the due process requirements of the Constitution, and that the petitioners had failed to exhaust their procedural remedy of an appeal to the Arkansas General Assembly, and, therefore, lacked standing to raise a denial of due process.

Petitioners' Petition for Rehearing was denied on March 26, 1990 by the Arkansas Supreme Court.

Although the State of Arkansas cannot be sued as a defendant for monetary damages in any of her courts, a claimant may file a cause of action in the Arkansas State

Claims Commission and obtain monetary damages. Claimants following said procedure are entitled to a public hearing conducted in a fair and impartial manner, giving the claimant the full opportunity to present evidence, cross-examine witnesses, and present arguments as provided by Ark. Code Ann. §19-10-210. The Commission is also required to adopt the procedure used by the Arkansas Chancery Courts to the extent practicable, and its hearings are required to be conducted in a judicial manner. (Appendix A-2). If a claimant is dissatisfied with the decision of the Arkansas State Claims Commission he has the right to appeal to the Arkansas General Assembly. (Appendix A-2). In the case herein, the petitioners did not avail themselves of this remedy.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied because the decision by the Arkansas Supreme Court in this matter does not conflict with the decisions of State and Federal Courts. The petitioners seek a review of the decision of the Arkansas Supreme Court in this case. Although the petitioners were denied access to the State courts (by virtue of the State's sovereign immunity, Article 5 §20 Arkansas Constitution) to seek damages against the Highway Department allegedly arising from breaches of contracts, the Arkansas Supreme Court in this case held that the petitioners were afforded an adequate post-deprivation remedy by being allowed to file their claim for damages against the Highway Department in the Arkansas State Claims Commission.

The petitioners argue that by virtue of the lack of a judicial review of their claim for damages that they are denied due process. The Arkansas State Highway and Transportation Department, on the other hand, contends that the remedy provided in the Arkansas State Claims Commission is constitutionally sound as a post-deprivation remedy. Under Ark. Code Ann. §19-10-210, a claimant in the Arkansas State Claims Commission is entitled to a public hearing conducted in a fair and impartial manner, is entitled to a full opportunity to present evidence, to cross-examine witnesses, and present arguments. Under said code provision, to the extent practicable, the Commission is required to adopt the procedure used by the Arkansas Chancery Courts, and its hearings are required to be conducted in a judicial manner.

Under the regulations of the Arkansas State Claims Commission, a claimant is entitled to appeal an adverse

ruling to the Arkansas General Assembly. The petitioners in this case did not do so. Therefore, the claimants respectfully submit that due to their failure to appeal to the General Assembly, they have no standing to challenge the adequacy of the Arkansas State Claims Commission as a post-deprivation remedy and that they cannot allege a denial of due process.

ARGUMENT

I.

THE ARKANSAS STATE CLAIMS COMMISSION SYSTEM DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT SINCE IT POVIDES CLAIMANTS WITH AN ADEQUATE POST-DEPRIVATION REMEDY.

The petitioners allege that the Arkansas State Claims Commission system violates the Due Process Clause of the Fourteenth Amendment. Strangely enough the petitioners cite *Parratt v. Taylor*, 451 U.S. 527 (1981) in support of its contention that the Arkansas Supreme Court's ruling in *Fireman's Ins. Co. v. Arkansas State Claims Commission*, 301 Ark. 451 (1990), is in conflict with the decisions of the U.S. Supreme Court regarding adequate post-deprivation remedies. An analysis of *Parratt v. Taylor, Supra*, shows otherwise.

In that case, an inmate at the Nebraska Penal and Correctional Complex ordered by mail hobby materials valued at $23.50. These materials were lost presumably by the Nebraska Prison's negligence. The inmate alleged that the negligence on the part of the prison deprived him of his property without due process of law. The District Court entered summary judgment for the inmate holding that negligent actions by State officials can be a basis for an action under 42 U.S.C. §1983. This ruling was affirmed by the Court of Appeals. The U.S. Supreme Court granted certiorari and reversed the judgment of the Court of Appeals.

This Court noted that the inmate chose to proceed under §1983 in spite of the fact that the State of Nebraska had a tort claims procedure which provided a remedy to persons who suffered tortious losses at the hands of the State. In this Court's opinion in *Parratt, Supra*, at 537, it was stated that we "must decide whether the tort remedies which the State of Nebraska provides as a means of redress for property deprivations satisfy the requirements of procedural due process." In concluding that the Nebraska post-deprivation remedy provided procedural due process, Justice Rehnquist opined that "the impracticality of providing any meaningful pre-deprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking can satisfy the requirements of procedural due process." *Parratt, Supra*, at 539.

In this instance, the alleged cause of action arose from the performance of a highway construction contract project where the initial contractor had defaulted, and the surety, Fireman's Insurance Company, and D. H. Blattner and Sons, Inc., had stepped in to complete the construction project as contracted by the original contractor. If a cause of action arose from the alleged breaches of contracts, negligence, and interferences by the Highway Department, there would be no way to anticipate the alleged extent of injury suffered by the petitioners until after the completion of the project. Thus, the propriety of a post-deprivation remedy is axiomatic.

Justice Rehnquist also reasoned that the extent of the remedy in comparison with that of a federal remedy does not in and of itself dictate whether the State remedy is adequate.

He stated:

> Although the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under §1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process.

Parratt v. Taylor, Supra, at 544.

This reasoning was followed in *Hudson v. Palmer*, 468 U.S. 517, 533 (1984), where it was held "that an unauthorized intentional deprivation of property by a State employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful post-deprivation remedy for the loss is available.

In spite of this Court's rulings in *Parratt v. Taylor* and *Hudson v. Palmer*, which are consistent with the ruling in the case at hand, the petitioners have cited several other cases that allegedly support their position that the Arkansas State Claims Commission system is not an adequate post-deprivation remedy. These cases can be easily distinguished from this case.

For instance, *Bumgarner v. Bloodworth*, 738 F.2d 966 (8th Cir. 1984), is wholly inapplicable. In that case, the plaintiff brought a §1983 action seeking declaratory and injunctive relief, damages, and the return of certain property seized during a search of the plaintiff's house. The Court of Appeals in *Bumgarner v. Bloodworth, Supra*, at 968 held that the Arkansas State Claims Commission was

not empowered to grant the plaintiff adequate relief, stating:

> Only the claims against the State Trooper is subject to the jurisdiction of the Claims Commission and since the Commission can make only monetary awards, even a judgment in plaintiff's favor against the Trooper would not give the plaintiff the relief he seeks, return of certain property.

Here, the petitioners, Fireman's Insurance Company and D. H. Blattner and Sons, Inc., are seeking *only* monetary damages. Therefore, the Arkansas State Claims Commission *is* empowered to grant adequate and full relief to the petitioners unlike the Court in *Bumgarner, Supra*, which could only grant partial relief.

Another case cited by the petitioners is *Birkenholz v. Sluyter*, 857 F.2d 1214 (8th Cir. 1988). The plaintiff, Pamela Birkenholz, who was the Director of Nursing at a private mental health facility licensed by the Department of Mental Health, filed a complaint alleging that the defendants violated her procedural due process rights when they found her guilty of neglect of mental health patients without giving her an opportunity for a hearing.

An examination of the facts in this case revealed that an investigation resulted in a finding that Pamela Birkenholz was guilty of failure to provide reasonable and necessary services to her clients. No notice of the allegations was presented to her, nor was an opportunity for a hearing provided prior to the decision of the Missouri Department of Mental Health being entered. Subsequently, Birkenholz was fired by the mental health facility. Thereafter, Birkenholz filed a §1983 action against her employer and the Depart-

ment of Mental Health officials alleging that they had violated her procedural due process rights by finding her guilty of neglect without a hearing. In her complaint, she sought compensatory and punitive damages and reinstatement to her former position. In response, the defendants filed a Motion to Dismiss contending that they were entitled to qualified immunity. This motion was denied by the District Court.

On appeal, the Eighth Circuit Court of Appeals held that even though Birkenholz was dismissed from her employment without notice and without an opportunity for a hearing prior to the termination of her job, that a *de novo* post-deprivation evidentiary hearing before a Missouri Circuit Court satisfied the due process requirements. Thus, although this case is relied upon by the petitioners, in reality it is supportive of the respondent's position that the post-deprivation remedy provided by Arkansas State Claims Commission is adequate "due process."

Also cited by the petitioners is *Lambert v. McFarland*, 612 F. Supp. 1252 (D.C. Ga. 1984). In that case, the plaintiff filed a §1983 action alleging, among other things, that the physical conditions in the Atlanta City Jail were such that his Fourteenth Amendment right to not be deprived of life, liberty, or property without due process was violated. The defendants, citing *Parratt v. Taylor*, 451 U.S. 527 (1981), moved for summary judgment arguing that in order for the Court to find that there had been a deprivation of due process, it must determine that there was no adequate State remedy for the plaintiff. The plaintiff countered the defendant's argument stating that he had no adequate State law remedy against the City of Atlanta because the Official Code of Georgia, §36-33-3, provides that "a municipal corporation shall not be liable for the torts of policemen or

other officers engaged in the discharge of duties imposed on them by law." Upon consideration of the defendants' Motion for Summary Judgment, the District Court of Georgia concluded that the defendant City was not entitled to said motion since the municipality was immune from liability with respect to the maintenance of a jail because it is considered a "governmental function" as opposed to a "ministerial duty." Because the City of Atlanta was immune from suit in performing the "governmental function" of maintaining the jail, the Court decided that it could not conclude as a matter of law that adequate State remedies were in existence. Therefore, the defendants' Motion for Summary Judgment was denied. However, the Court noted that according to Georgia law liability for negligence is imposed on officers and public employees when the acts in question are of a ministerial nature.

Ultimately, the Georgia District Court in *Lambert* ruled that given the state of the record that was before it, it could not rule that as a matter of law that adequate State remedies were in existence. More specifically, the Court stated that there must be a determination if the intent of the jail conditions was to punish. For if the conditions were a manifestation of an intent to punish, then the Constitution would prohibit such conditions. Without a sufficient record, the Court said it was unable to grant the defendants' Motion for Summary Judgment. Therefore, it is submitted that *Lambert v. McFarland* is not supportive of the petitioners' position as they allege. Rather, the fact that the Court stated that it must make a determination of whether a post-deprivation remedy was available in order to determine if due process had been denied the plaintiff strengthens the respondent's argument that the petitioners were not denied due process in this case.

While the petitioners cite yet another case, *Hight v. Burden*, 350 S.E. 2d 471 (Ga. App. 1986), which held that the post-deprivation remedy provided under Georgia law did not provide due process under *Parratt* and *Hudson*, the respondent submits that the opinion in that case is not persuasive nor is it binding on the Arkansas Supreme Court. There are in fact two federal cases from Arkansas that deal with the adequacy of the Arkansas State Claims Commission procedure in relation to the Due Process Clause of the Fourteenth Amendment.

In *Steffen v. Housewright*, 665 F.2d 245 (8th Cir. 1981), an inmate housed in the Cummins Unit of the Arkansas Department of Correction brought a §1983 action against the Director of the Arkansas Department of Correction and other officials for certain property belonging to him valued at $882.70 that had been stolen, lost or misplaced. Prior to filing the §1983 action, Steffen filed a claim in the Arkansas Claims Commission seeking compensation for the property. The Claims Commission awarded him $200.00. Steffen filed his §1983 action in the U.S. District Court where the defendants' Motions to Dismiss were granted. On appeal the Eighth Circuit Court of Appeals held that although Steffen was deprived of property belonging to him, he was not deprived of said property without due process of law since he had an adequate post-deprivation remedy in the Arkansas State Claims Commission.

In *Light v. Blackwell*, 472 F. Supp. 333 (E.D. Ark. 1979), the plaintiffs filed a §1983 action for the taking of their property without just compensation, and for the continuing torts of trespass, maintenance of a nuisance and unreasonably depriving the plaintiffs of natural lateral support to their property. In the defendants' Motion to Dismiss they alleged that the plaintiffs had failed to state a constitutional

violation invoking jurisdiction under 42 U.S.C. §1983. Upon consideration of the defendants' contention, the U.S. District Court of Arkansas agreed with the defendants and held that the State Claims Commission satisfied the constitutional requirement of due process and that it was readily available to the plaintiffs. Quoting from the opinion in *Bonner v. Coughlin*, 517 F.2d 1311 (7th Cir. 1975) it was stated:

> This is not to suggest that the plaintiff in a §1983 action must exhaust his state remedies before seeking federal relief. Rather, it seems to us that the availability of an adequate state remedy for a simple property damage claim avoids any constitutional violation. This result is entirely consistent with the basic statutory purposes as explained in *Monroe v. Pape*. There is simply no need to provide a federal tort remedy for property damage caused by the negligence of state agents if a state remedy is not only adequate in theory but also readily available in practice.

Light v. Blackwell, *Supra*, at 338.

Making reference to three other cases, the petitioners argue that it was not necessary for them to appeal the Arkansas State Claims Commission decision to the Arkansas General Assembly for a review of the Commission's decision. The first case they cite is *Honig v. Doe*, 484 U.S. 305 (1988). In *Honig*, *Supra*, this Court dealt with the unilateral action of a school administration relating to the removal of a disabled child from a school system as a consequence of certain dangerous conduct that he had exhibited. The legal issue involved in that case was whether the disabled child had to exhaust all of his available administrative remedies before seeking judicial relief.

In *Honig*, it was recognized that in cases where exhaustion of all administrative remedies would be futile either as a "legal or practical matter," that it would be proper to seek an injunction in federal court restraining the school administration from taking unilateral action in removing a disabled child from the school system. The rationale in this opinion was based on the realization that the administrative procedures, that would have been entailed in challenging the school administration's decision, would have been too ponderous and lengthy to afford an effective remedy. Although the petitioners cite *Honig* in support of their argument, they made no showing that an appeal to the Arkansas General Assembly would be of a similar nature to the administrative remedies that were available in *Honig*.

Oddly enough, the petitioners cite *Barr v. Ark. Blue Cross and Blue Shield*, 297 Ark. 262 (1988) for the proposition that a party need not exhaust all administrative remedies. Yet, the ruling in that case was that the appellant failed to establish the circumstances that would relieve them from first pursuing their administrative remedies under the Federal Employees Health Benefit Act.

Arkla Exploration Company v. Texas Oil and Gas Corporation, 734 F.2d 347 (8th Cir. 1984), which is also relied upon by the petitioners, allegedly concerns the doctrine of exhaustion of administrative remedies. The respondent asserts that this case actually concerns the leasing of federal lands and the question of mootness. Under federal law, before government lands may be leased for oil or gas exploration without competitive bidding, the Secretary of the Interior must determine that the lands are not within a "known geological structure of a producing oil or gas field" (KGS). The issue in *Arkla, Supra*, concerned whether the Secretary made a proper KGS determination before granting

oil and gas exploration leases to Texas Oil and Gas Corporation on a non-competitive basis. Upon learning of these leases, Arkla filed an administrative protest against the issuance of the leases to Texas Oil and Gas Corporation. Three days after Arkla had filed its protest, the Secretary of the Interior ordered a reevaluation of the land leased to Texas Oil and Gas Corporation which resulted in the invalidation of said leases. Consequently, the protest filed by Arkla was dismissed as moot.

Therefore, none of the cases cited by the petitioners with respect to the doctrine of exhaustion of administrative remedies are relevant. It is, therefore, the respondents' position that the petitioners should have availed themselves of the opportunity to appeal to the Arkansas General Assembly and that they have been afforded due process.

II.

THE ARKANSAS STATE CLAIMS COMMISSION SYSTEM PROVIDES CLAIMANTS WITH AN OPPORTUNITY TO BE HEARD IN A MEANINGFUL MANNER IN ACCORDANCE WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Mathews v. Eldridge, 424 U.S. 319 (1976), is cited by the petitioners as authority for their contention that the Arkansas Claims Commission system violates the due process requirements of fundamental fairness. The petitioners allege that they were not given an opportunity to be heard "in a meaningful manner" since the Claims Com-

mission is not independent from the General Assembly. The Arkansas State Highway and Transportation Department respectfully submits that the petitioners have misconstrued the opinion in *Mathews v. Eldridge*. In that case, which involved the termination of Social Security disability benefit payments to a recipient without prior notice, this Court held that something less than an evidentiary hearing is sufficient prior to the entry of an adverse administrative action terminating disability benefits. In analyzing the procedural safeguards that were in place in *Mathews v. Eldridge*, this Court quoted approvingly from *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) saying:

> [D]ue process is flexible and calls for such procedural protections as the particular situation demands.

The Arkansas State Highway and Transportation Department respectfully submits that consideration of "the particular situation" of the facts in this case must not be ignored. Here, it was not an action on the part of the Highway Department that brought on this litigation. Rather, it was the breach of contract by the original contractor who had voluntarily entered into a contract with the Highway Department after it had analyzed the job specifications called for under the contract and had submitted an itemized bid for the construction project. After the original contractor had begun work on the project it defaulted because of its own inability to fulfill its contractual obligations. At that point the surety, Fireman's Insurance Company, and the second contractor, D. H. Blattner and Sons, Inc., stepped into the shoes of the original contractor and fulfilled the remainder of the contract.

In challenging the Arkansas State Claims Commission

system as being fundamentally unfair because of its lack of procedural guidelines, the petitioners cite two recent U.S. Supreme Court cases. They maintain, without foundation, that the State's interest in having a Claims Commission procedure is premised on the interest of the State in limiting the amount of monetary damages awarded against it by claimants seeking damages against the State of Arkansas. In setting forth this argument, the petitioners contend that this Court has rejected the premise that an adverse pecuniary impact on a State's economy is sufficient to justify a violation of procedural due process, citing *Ake v. Oklahoma*, 470 U.S. 68 (1985).

It is respectfully submitted that the petitioners' reliance on *Ake v. Oklahoma, Supra*, is misplaced. In that case this Court considered "whether the Constitution requires that an indigent defendant have access to the psychiatric examination and assistance necessary to prepare an effective defense based on his emotional condition, when his sanity at the time of the offense is seriously in question." *Ake v. Oklahoma*, at 70. The facts in that case are totally dissimilar from the case at hand.

In *Ake* the central issue revolved around the right of an indigent criminal defendant to be afforded a psychiatrist when his defense is based on a plea of insanity. This Court concluded that to deny the defendant access to a psychiatrist would deny him "the raw materials integral to the building of an effective defense." *Ake v. Oklahoma* at 77. This Court also held that the State of Oklahoma's interest in preventing a staggering financial burden, which the State anticipated if it were required to provide a competent psychiatrist for each indigent defendant, was not a compelling interest on the part of the State to justify the preclusion of the State providing a defendant with a competent psychiatrist. From

that case, the petitioners attempt to apply its rationale to the factual circumstances of this case.

The respondent submits that any analogy between *Ake* and this case is totally without merit. One, the petitioners are assuming without citing any authority whatsoever that the purpose of the Claims Commission system is to limit the financial responsibility of the State. Two, the availability of a psychiatrist for a defendant in the presentation of a criminal proceeding goes to the heart of the defense of a defendant claiming insanity at the time of the commission of a crime. Whereas, the lack of a judicial review of a decision rendered by the Arkansas Claims Commission does not inhibit in any way a claimants' presentation of their cause of action.

In this case, *Fireman's Insurance Co. v. Arkansas State Claims Commission*, 301 Ark. 451 (1990), the petitioners filed their complaint, and they were afforded an opportunity to prove their claim. A complete transcript of the hearing was made and preserved and a written Order was entered by the Claims Commission denying the petitioners' claim. All of which is in accordance with Ark. Code Ann. §19-10-210(b)(1) and (2), which provide:

> (b)(1) In conducting hearings, the commission shall not be bound by the formal rules of evidence and shall conduct all hearings publicly and in a fair and impartial manner, giving the parties full opportunity for presentation of evidence, cross-examination of witnesses, and argument.
>
> (2) To the extent practicable, the commission shall adopt the procedure used by the Arkansas chancery courts, and its hearing shall be conducted in a judicial manner.

All of this is well within the "due process" procedural requirements as interpreted by this Court. In *Washington v. Harper*, 494 U.S. ____, 110 S.Ct. 1028 (1990), it was stated that the Due Process Clause "has never been thought to require that the neutral and detached trier of fact be law trained or a judicial or administrative officer." *Parham* 442 U.S. 584, 607 (1979).

The petitioners also cite *Washington v. Harper, Supra*, vainly attempting to apply the holding in said case to the facts presented in this matter. These two factual and legal settings are completely inapposite. On the one hand in *Washington v. Harper*, the primary issue involved the procedural safeguards that were required by the State prior to treating a mentally ill prisoner with anti-psychotic drugs against his will. The contractual dispute between the parties at hand in no way measures up to the personal invasion by the State into the mind of a prisoner for the purpose of altering his very essence — his thought processes. A further distinction is that the petitioners can be made whole with an award of monetary damages after the fact; whereas, a person being treated with anti-psychotic drugs may be altered irrevocably by the taking of these drugs. Consequently, some type of pre-deprivation remedy is necessary prior to administering mind altering drugs.

A large portion of the petitioners' second point of argument is devoted to the amount of discretion that the Arkansas General Assembly has in reviewing a decision of the Claims Commission. The thrust of their argument is that the General Assembly's authority is so broad that it renders the Arkansas State Claims Commission system inadequate. The respondent respectfully submits that under *Parratt, Supra*, the Arkansas State Claims Commission system satisfies the test of an **adequate** post-deprivation

remedy. Furthermore, the two Arkansas federal court cases cited earlier, *Light v. Blackwell, Supra*, and *Steffen v. Housewright, Supra*, have held that the Arkansas State Claims Commission procedure does not violate the Fourteenth Amendment.

Therefore, the respondent submits that the additional remedy or recourse that the petitioners could have sought, by appealing to the Arkansas General Assembly, does not in any way diminish from the procedural safeguards that are available to any potential claimant who wishes to file a claim against the State of Arkansas. We submit that if the first bite of the apple, i.e. the Arkansas Claims Commission system, satisfies the due process requirements, that the fact that a second procedural remedy is in existence cannot nullify the "due process" that has already been afforded the petitioners. This is particularly true in this case since the petitioners did not even seek an appeal to the General Assembly. For without availing themselves of that remedy, the petitioners, the respondents, and this Court will never know if they would have been awarded the damages that they sought in the Claims Commission. Having not exhausted all the remedies available to them, they cannot be heard to complain that they were denied due process.

CONCLUSION

For these reasons, the petitioners' Petition for Writ of Certiorari should be denied.

Respectfully submitted.

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United States Constitution, Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Arkansas Constitution, Article 5, §20

The State of Arkansas shall never be made defendant in any of her courts.

Arkansas Constitution, Article 16, §2

The General Assembly shall from time to time provide for the payment of all just and legal debts of the State.

Ark. Code Ann. §19-10-204

(a) Except as otherwise provided by law, the Arkansas State Claims Commission shall have exclusive jurisdiction over all claims against the State of Arkansas and its several agencies, departments, and institutions but shall have no jurisdiction of claims against municipalities, counties, school districts, or any other political subdivisions of the state.

(b) The commission shall have no jurisdiction of, or authority with respect to, claims arising under the Workers' Compensation Act, Employment Security Act, Teacher Retirement Act, Public Employees Retirement Act, State

Police Retirement Act, or under laws providing for old age assistance grants, child welfare grants, blind pensions, or any laws of a similar nature.

Ark. Code Ann. §19-10-210

(a) The Director of the Arkansas State Claims Commission shall notify each claimant and also the head of each state agency, department, or institution against which a claim is filed of the time and place set for the hearing thereof.

(b)(1) In conducting hearings, the commission shall not be bound by the formal rules of evidence and shall conduct all hearings publicly and in a fair and impartial manner, giving the parties full opportunity for presentation of evidence, cross-examination of witnesses, and argument.

(2) To the extent practicable, the commission shall adopt the procedure used by the Arkansas chancery courts, and its hearing shall be conduted in a judicial manner.

RULES AND REGULATIONS OF THE ARKANSAS CLAIMS COMMISSION

APPEAL OF COMMISSION'S DECISION

The only appeal from the Claims Commission is to the Arkansas General Assembly. As an arm of the state legislature, the Commission's findings and decisions are subject only to review by the General Assembly as to awarding monetary damages. A final and binding decision of the Commission can only be appealed to the General Assembly to be reversed, amended or overturned.

HEARINGS

Rule 4.1 How Hearings Are to Be Conducted

The Commission, while not bound by the formal rules of evidence as stated in ARK. STAT. Ann. 13-1401, has adopted where applicable the procedure used by the Arkansas Chancery Courts and its hearings shall be conducted in a judicial nature.

Because the Commission is a fact-finding body for the General Assembly, the simplification and defining of the issues in question before the Commission is encouraged prior to hearing. The propriety of prior mutual exchange of testimony, exhibits or such matters that may be stipulated for the purpose of clarification, amplification or limitation is strongly encouraged.

Rule 4.2 Pre-hearing Conferences

If the interested parties prior to the hearing of a claim on the merits are unable to agree upon the facts or issues or cannot stipulate the questions of fact in issue, the Commission will arrange a pre-hearing conference to rule upon Motions pending or determine the evidential value to assist the parties in determining the factual basis of a claim.

Rule 4.3 Appearances

Any individual may appear for himself in his own behalf or have his claim presented by counsel, duly admitted as such to practice law in the State of Arkansas.

Any individual who elects to represent himself without the aid of counsel shall be held accountable in the same manner, and to the same degree, as qualified counsel entitled to practice before the Commission.

Rule 4.4 Witness Examination, Order of Procedure

Witnesses will be orally examined under oath before the commission unless their testimony is taken by deposition. The procedure of direct and cross-examination of a witness shall be the same as in courts of law and equity unless the Commission directs otherwise. After questioning under direct and cross-examination, the Commission members may question the witness to ascertain any points or facts.

The order of presentation may be varied by the Commission Chair, who may designate the order of witness presentation in any type of proceeding.